BLANK PAGE

BLANK PAGE

INDEX.

CITATIONS.

CASES:

STATUTES:

MISCELLANEOUS: Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 39

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner,*

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 30-34) is reported in 108 F. (2d) 737.

JURISDICTION.

The decision of the Court of Appeals was entered on November 29, 1939 (R. 30). The motion for re-argument filed by the Commission was denied January 2, 1940 (R. 48). The petition for writ of certiorari was filed April 2, 1940 and granted May 6, 1940. Jurisdiction of this Court

is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 and under Section 402(e) of the Communications Act of 1934.

QUESTION PRESENTED.

Whether a decision and order of the Federal Communications Commission denying an application for transfer of an existing radio station license to a new holder filed under and pursuant to Section 310(b) of the Communications Act is appealable to the Court of Appeals for the District of Columbia under the provisions of Section 402(b) of that Act, or whether such decision and order is subject to review only by a district court of three judges under the Urgent Deficiencies Act of October 22, 1913, as extended by Section 402(a) of the Communications Act.

STATUTES INVOLVED.

The pertinent provisions of the Communications Act of 1934, as amended, and the Radio Act of 1927, as amended, are set out in the Appendix to the brief of the Petitioner, pp. 38-52.

STATEMENT.

This case commenced with the filing on August 8, 1936 of an application requesting the consent of the Federal Communications Commission to the transfer of the license to operate radio station KSFO from The Associated Broadcasters, Inc. (Respondent in No. 40 and referred to hereafter as "Associated") to Columbia Broadcasting System of California, Inc., the Respondent here (referred to hereafter as "Columbia"). The application was filed under Section 310(b) of the Communications Act of 1934. Both Associated and Columbia executed the form of application prescribed by the Commission and both parties filed other extensive data bearing upon the contractual arrangements between the parties and the value and earnings of

the property, all as required by the Commission's Rules and Regulations (R. 1-2).

Upon examination of the application and supporting documents (R. 8), the Commission designated the application for hearing upon the following issues specified by it: (1) To determine the legal, technical, financial and other qualifications of the proposed assignee to continue the operation of the station; (2) to determine whether the application may be granted within the purview of Section 310 of the Communications Act of 1934; and (3) to determine whether the granting of the application would serve public interest, convenience, and necessity (R. 2).

On December 2, 1936, a hearing on the application was held before an examiner of the Commission who filed his report on April 6, 1937 recommending that the application be denied (R. 8). Both Associated and Columbia filed exceptions to the report of the Examiner and oral argument on the exceptions was held before the Broadcast Division of the Commission on July 1, 1937, and again after the divisions of the Commission were abolished before the Commission *en banc* on January 13, 1938 (R. 2). On October 18, 1938, the Commission rendered its decision and order denying the application (R. 7-17). On November 12, 1938, both Associated and Columbia filed separate appeals in the Court of Appeals for the District of Columbia pursuant to Section 402(b) of the Communications Act (R. 1-7). On December 14, 1938, the Commission filed motions to dismiss each appeal "on the ground that this Court is without jurisdiction to entertain the same" (R. 17). Upon Columbia's motion, the lower court entered an order holding the preparation and printing of the record in abeyance until the determination of the question of jurisdiction, and on February 4, 1939 assigned the Commission's motion to dismiss the appeals for oral argument (R. 28-29). Argument was had on the motions to dismiss, and the decision of the Court overruling the motions (Justice Stephens dissenting) was rendered November 29, 1939 (R. 30-34). On December 16,

1939, the Commission filed motions for reargument in both appeals (R. 35-47), and on January 2, 1940, these motions were denied by the court without opinion (R. 48).

SUMMARY OF ARGUMENT.

The court below had jurisdiction to entertain these appeals because Columbia was an "applicant for a radio station license" within the meaning of Section 402(b)(1) of the Communications Act and Associated was a "person aggrieved or whose interests were adversely affected" within the meaning of Section 402(b)(2) of that Act.

I.

The language of Section 402 of the Act is such as to admit of no doubt that Congress intended all decisions and orders of the Commission of the type involved here to be subject to judicial review in some tribunal. The order in question is either one "refusing an application * * * for a radio station license" and as such appealable to the Court of Appeals for the District of Columbia under the provisions of Section 402(b), or it is one of that class described as "any (other) order of the Commission" and as such reviewable by a statutory three-judge court under the provisions of Section 402(a) of the Act.

No reason exists, either as a matter of grammatical construction of the language used by Congress or because of the inherent nature of the proceeding, why the term "applicant for a radio station license" should not include one who makes application to the Commission for authority to acquire an existing license as well as one who makes application to the Commission for a new license. Section 310(b) governing the assignment of existing licenses, like Sections 309(a) and 319 governing the issuance of new licenses, is part of the licensing scheme established by the Act in furtherance of its general purposes. The duty to be performed by the Commission in acting upon either type of application requires the exercise by it of its quasi-judicial functions in

applying the same statutory standard with the same end in view. Both as it affects the public and the individuals concerned, there is no legitimate basis for distinction.

Minor differences and contrasts in phraseology found in the several licensing sections of the Act can not be construed to indicate major differences in the functions to be performed by the Commission or in the purpose to be accomplished by the performance of those functions. The test is one of substance and not form, and as thus tested, there is no difference between the two types of applications, and Congress has indicated none, either in the treatment to be given such applicants before the Commission or in securing a judicial review of an adverse Commission decision and order. The decision of the lower court that it had jurisdiction is manifestly correct.

II.

The legislative history of Section 402 supports the construction placed upon that section by the lower court. All legislative records show that in adopting this section, Congress had a definite legislative scheme in mind. It proposed to and did: (1) Extend the provisions of the Urgent Deficiencies Act (38 Stat. 219) and made them applicable to all decisions and orders of the Commission rendered in common carrier matters; (2) transfer the appellate provisions of the Radio Act of 1927, as amended, to all broadcast licensing cases except those initiated by the Commission upon its own motion; and (3) as to this latter type of case, it made provision for judicial review of the Commission's decisions and orders before a statutory three-judge court in the manner provided in the Urgent Deficiencies Act. The reasons for the adoption of such a scheme were satisfaction with existing provisions of law as they related to cases in the first two classes and an unwillingness, in cases falling in the third class, to compel persons who were proceeded against by the Commission to litigate their case in the District of Columbia court.

The rule announced by the majority of the court in the case of *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, has been rejected by the court which announced it and there is no basis for contending that Congress ratified the rule of construction therein announced when it reenacted substantial portions of Section 16 of the Radio Act of 1927, as amended. In the first place, the *Pote* case was presented to and decided by the Court upon a different theory; in the second place, the transfer section of the Radio Act (Section 12) is substantially different from the transfer section of the Communications Act (Section 310(b)); and finally, there is no precedent for invoking the rule of legislative ratification under the circumstances disclosed in the present case. A single decision of a lower federal court construing a legislative act can not be considered as a well settled interpretation of that act even though this Court refused to grant certiorari to review that decision.

Transfer cases arising under Section 310(b) are initiated by the parties rather than the Commission on its own motion. Nothing found either in the Act or in the legislative records indicates an intention upon the part of Congress to depart from its general plan or statutory scheme to the effect that those who initiate such cases must come to the Court of Appeals for the District of Columbia to secure judicial review of an adverse decision and order. All legislative proceedings are consistent with the decision of the lower court and jurisdiction in that court to review the decision and order in question.

ARGUMENT.

The question to be determined here is a narrow one. It is not *whether* but *where* a decision and order of the Federal Communications Commission denying an application for assignment of a radio station license filed and prosecuted under Section 310(b) of the Communications Act is subject to judicial review. The decision and order in question is clearly the type of administrative order which can be

the subject of judicial review. (*Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 143; *Federal Power Commission* v. *Pacific Power Co.*, 307 U. S. 156, 159.) Moreover, it is plain from the terms of the Act that Congress intended all such orders to be subject to such review in some judicial tribunal. The only doubt, if indeed there is doubt, concerns the proper tribunal.

This question arises out of the fact that while paragraph (a) of Section 402 provides that "any order of the Commission", with certain stated exceptions, is subject to review in the manner provided in the Urgent Deficiencies Act (38 Stat. 219) and all orders of the Commission exempted from the operation of paragraph (a) of Section 402 are by paragraph (b) of that section made appealable to the Court of Appeals for the District of Columbia, neither paragraph of that Section in terms refers to decisions or orders made by the Commission on applications for assignment of license. Since Congress might have elected either method, the accuracy of the decision of the Court of Appeals for the District of Columbia in sustaining its jurisdiction rests upon the construction to be given paragraphs (a) and (b) of Section 402, their relationship to each other, and to the general scheme of the Act. Here, as in other instances where the construction of a statute is involved, resort may be had not only to the terms of the statute itself but if, in the opinion of the Court, the meaning of such language is doubtful, resort can also be had to the history and purpose of the legislation as evidenced by proceedings in the Congress. We submit that tested by any or all of these recognized criteria, the decision of the lower court was correct.

I.

The Words "Any Applicant for a Radio Station License" as Used in Section 402(b) Plainly Include Both an Applicant for a New License and an Applicant for a License Already in Existence.

We agree with Petitioner that the jurisdiction of the Court of Appeals for the District of Columbia depends upon whether or not Columbia was an "applicant * * * for a radio station license" as that term is used in Section 402(b) of the Act. We further agree that unless Columbia was such an applicant, Associated had no standing in the lower court as an appellant since only those persons who are "aggrieved or whose interests are adversely affected" by a decision of the Commission which is appealable under Section 402(b)(1) are given any right of appeal under Section 402(b)(2). But we contend that both because of the language of the Act itself and because of the inherent nature of the proceeding referred to therein and contemplated thereby, Columbia was an "applicant for a radio station license" within the meaning of Section 402(b)(1).

A. The plain and ordinary meaning of the words employed does not admit of the distinction which Petitioner attempts to draw.

We know of no reason, and Petitioner suggests none, why the word "applicant" appearing in Section 402(b) does not include one who makes application for an existing license as well as one who makes application for a new license. Certainly there can be no question that the term "radio station license" includes any instrument of authorization without which the operation of a "radio station" as defined in Section 3(k) of the Communications Act would be unlawful under the provisions of Section 301 of that Act. Our first and we submit our only necessary proposition is that the plain and ordinary meaning of the

words employed by Congress in Section 402(b) of the Act sustains the jurisdiction of the lower court and the correctness of its decision with respect thereto.

B. The function performed by the Commission in approving a transfer of license is the same and performed in the same manner as in the case of granting a new license.

If regard is had for the inherent nature of the proceedings contemplated by Section 309(a) relating to the acquisition of a new license and Section 310(b) relating to the acquisition of a license already in existence, the same conclusion follows. Mere form and names can not be accepted as controlling. "We must not 'be misled by a name, but look to the substance and intent of the proceedings.'" (*Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 277.)

As thus viewed, there is no basic or fundamental difference between a proceeding designed to secure a new license and a proceeding designed to secure a license then held by another. In either case the question to be determined by the Commission is essentially the same and its duties and responsibilities are the same. Questions of allocation aside,[1] it is the object and purpose of either type of pro-

[1] Questions of allocation involve, among other things, the power, frequency, location and technical apparatus of a station. In the case of an application for a construction permit to construct a new station (Section 319) or in the case of an application to modify an existing station license (Section 309(a)), matters of allocation may be, and frequently are, of paramount importance. The station never having been in operation, or never having been in operation in the manner now proposed, may because of electrical interference adversely affect other licensees or applicants or the public itself. In the ordinary transfer or assignment case, application is made only for an instrument of authorization to operate a station which was originally constructed pursuant to a construction permit granted under Section 319 and which has been operated by another pursuant to a license granted under Section 309(a). In this respect the proceeding is essentially similar to an application for a new license filed under Section 309(a) to cover a station previously constructed pursuant to a permit granted under Section 319 as no matters of allocation are involved.

ceeding to secure proper and qualified holders of those instruments of authorization which the Commission is empowered to grant under Title III of the Act. To this end, the Commission must consider either applicant in the light of "his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." (*Federal Communications Commission* v. *Sanders Brothers*, No. 499, decided March 25, 1940.) In neither case is the Commission's power of determination absolute; in both cases it is limited and circumscribed by the statutory standard imposed by Congress.[2] (*Radio Commission* v. *Nelson Brothers Co., supra*, p. 285.)

Petitioner's contention that the two proceedings are fundamentally different, because in the one case application is made to the Commission for the granting of a license while in the other case application is made to the Commission not for a license but only for its consent to deal with a license, is tenuous and strained.[3] It is apparently based

---

[2] In view of the context and general purposes of the Act (Sections 1 and 301), no significance can be attached to the use of the term "public interest, convenience or necessity" as the statutory standard in Sections 309(a) and 319 as distinguished from the term "public interest" used in Section 310(b).

As a matter of fact, the conduct of the Commission itself in this case is the best answer to any such contention. The third ground of the Commission's notice of hearing was: "To determine whether the granting of the application would serve public interest, convenience and necessity" (R. 2).

[3] Petitioner seems to lose sight of the fact that neither the Congress nor its agent, the Commission, creates a radio station but only regulates its construction and technical operation. Radio can and does exist without regulation of the type provided by the Communications Act and without the restrictive and prohibitory provisions of that Act could exist here as an instrument of universal even though limited use. The authority to construct (Section 319) and subsequently to operate (Section 309) a new radio broadcast station is of precisely the same character and derivation as that which must be had to operate such equipment and use a license previously belonging to another (Section 310(b)). In both cases, due to the provisions of the Communications Act, the authority of the Commission is required. In either case, the act could be consummated by the individual or individuals involved had Congress not made such conduct unlawful.

upon a refusal by Petitioner to recognize that Section 310(b) of the Act, like Sections 307, 308, 309 and 319, are part and parcel of the licensing provisions of the Act; that it is just as essential to the proper administration of the Act that licenses already in existence be transferred, if at all, to proper holders as that new licenses are granted to such holders.

Under the practice in effect now and since the organization of the Federal Radio Commission pursuant to the Radio Act of 1927, transfer or assignment cases are initiated by the filing of application forms prescribed by the Commission.[4] Both the proposed transferee and the proposed transferor must execute such an application form and, under present regulations of the Commission, the same must be filed sixty days prior to the contemplated effective date of the assignment or transfer.[5] The fact that after executing an application for an assignment of license, filing the same with the Commission and actually securing the Commission's authority for the assignment in question either the proposed transferee or proposed transferor might decline to proceed with the assignment does not alter the function of the Commission in such cases or distinguish those functions from those performed in the case of an application for a new license. In either case, the authorization granted by the Commission is permissive and not mandatory; in either case, after receiving the authority for which application is made, the recipient of such authority may fail or refuse to exercise the same. The only difference between an assignment case and an application for a new license is that, due only to the requirements of the Commission's regulations and practice (See footnote

[4] See F. C. C. Form No. 702 in use at the time of the filing of the application involved here (August 8, 1936) and F. C. C. Form No. 314 in use since December 19, 1938.

[5] See Commission Rules and Regulations, Section 103.18 approved December 18, 1935, and Section 1.364 in effect since August 1, 1939.

6, p. 13 *post*), two applicants rather than one applicant are involved, and that two rather than one can neglect or refuse to consummate the transaction for which the Commission has granted its authority.

Both in the case of an application for a new license and in the case of an application for transfer of an existing license, the Commission only is empowered to grant the authority requested, and a grant, if made, and the transaction for which authority has been granted consummated, will secure the same result both as to the applicant involved and as it affects the public. The result in so far as the applicant is concerned is that he will be authorized to operate radio transmitting apparatus, the operation of which would otherwise be unlawful (Section 301). The result in so far as the public is concerned will be the furtherance of the objects and purposes for which the Commission was established and has been continued, namely, "to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time under licenses granted by Federal authority * * *" (Section 301).

C. Minor differences and contrasts in phraseology employed by Congress in the several licensing sections of the Act do not indicate major differences in purpose and function.

Petitioner's contention that the contrast in terminology between those provisions of the Act dealing with applications and applicants for new licenses and construction permits (Sections 307, 308, 309 and 319) and those dealing with the assignment of a license demonstrates basic differences in the two proceedings is without substance. It is of no consequence that those sections of the Act dealing with new licenses refer to the moving party as an "applicant" while Section 310(b) does not; that the Act (Section 308) specifically requires an application for a new license to be exe-

cuted under oath, whereas Section 310(b) does not contain such a requirement;[6] and that Section 308 specifically requires the submission of certain information in the application form for new license which would be inappropriate to assignment cases,[7] whereas Section 310(b) requires only that the Commission secure "full information." These are points of distinction which do not give rise to basic differences. They do not alter the fact that both proceedings are fundamentally similar in all material respects. Petitioner's contention to the contrary is at variance with the cardinal rule of statutory construction to the effect that a legislative act can not be read piecemeal or so that one part nullifies or unnecessarily conflicts with another but that such interpretation must, if possible, be given as will reconcile all parts of a statute with the intent of the lawmakers and the manifest purposes of the legislation. (*Petri* v. *Commercial National Bank*, 142 U. S. 644, 650; *U. S.* v. *Ryan*, 284 U. S. 167, 175; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.)

Petitioner's contention that Columbia, an applicant under Section 310(b), could not be an "applicant for a radio station license" within the meaning of Section 402(b) because Congress also dealt with the subject of the transfer

---

[6] Section 1.364, par. (b) of the Commission's Rules and Regulations specifying the procedure to be employed in cases involving assignment of license or transfer of control of licensee corporations specifically provides: "With each such application, involving any standard broadcast station construction permit or license, there shall be submitted under oath or affirmation all information required to be disclosed by the application forms prescribed by the Commission, together with such other information under oath or affirmation as the Commission may require."

[7] For reasons heretofore stated (see footnote 1, p. 9, *ante*), certain information necessary and essential to an application for authority to construct a station under Section 319 or to modify a license under Section 309(a) is inappropriate in an assignment case. Aside from matters of allocation, substantially the same information is required (compare F. C. C. Form No. 314 for use in assignment cases and F. C. C. Form No. 301 for use in making application for construction permits for new stations).

of control of corporate licensees in Section 310(b) is not only beside the point but, in our view, erroneous. In the first place, no question concerning the transfer of stock in a licensee corporation is involved in the present case. In the second place, Petitioner's conclusion does not follow from the premise stated by it. Congress clearly regarded the transfer of control of a licensee corporation as a transfer of a license "indirectly", but none the less a transfer. It does not follow that because both types of transfers were dealt with in the same section and were regarded as involving similar considerations, an applicant for either type of authority can not be considered as an applicant for a radio station license. As opposed to this, we believe that the treatment of this subject indicates a desire upon the part of Congress to deal with substance rather than form, and serves to make the major contention now being made by Petitioner all the more untenable.

Nor can significance be attached to the fact that Section 309(a), dealing with applications for a new license, specifically requires hearing before denial, whereas Section 310(b) does not.[8] The requirement that hearings precede orders

---

[8] In the Fifth Annual Report of the Federal Communications Commission dated November 15, 1939, it is stated (pp. 42-43): " * * * Hearings were held on twenty-five applications involving assignment of license and transfer of control of licensee corporations, eleven of which were decided and the remainder were still pending at the close of the year. The majority of such applications were acted upon without the necessity of formal hearings, * * *.")

The failure of Congress to be more specific concerning the procedure to be employed in handling transfer applications arising under Section 310(b) and its failure to make a hearing before denial in terms mandatory doubtless arises, in part at least, out of the fact that only recently has any contention been made that a hearing before denial was not required. It was the universal practice under Section 12 of the Radio Act to grant hearings before denial of transfer applications and until recently, under Section 310(b) of the Communications Act, this procedure was likewise followed.

An interesting parallel is furnished by Sections 309(a) and 319 of the Communications Act. Both the Federal Radio Commis-

promulgated by a body with power "to ordain" and "that impinge upon legal rights" has its origin in constitutional requirements of due process. (*Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 318; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123). The Act must be read in such manner as to extend the procedural requirements of notice and hearing specified in Section 309(a) to applications under Section 310(b), or impute to Congress an intention both unlawful and unjust. (*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304-305; *U. S.* v. *Katz*, 271 U. S. 354, 357.)

It is fundamental that a finding of compliance or lack of compliance with a statutory standard in proceedings such as those contemplated by either Section 309(a) or Section 310(b) involves more than executive discretion or an ordinary executive determination. (*Morgan* v. *U. S.*, 298 U. S. 468, 479.) Both proceedings are adversary in the sense that applicants for such authority are in contest with the Government, acting through the Commission, concerning the taking by such applicants of steps which but for the restrictions imposed by the Act could unquestionably be taken. (*Morgan* v. *U. S.*, 304 U. S. 1, 20; *Federal Power Commission* v. *Pacific Power Co.*, 307 U. S. 156, 159.) A determination of the character required by either Section 309(a) or 310(b) is judicial or quasi-judicial in nature, and parties to be affected thereby have the right to a "full hearing" with all that that term implies.[9] (*Morgan* v. *U. S.*,

---

sion and the Federal Communications Commission have granted hearings before denial in the case of applications for construction permits filed under Section 16 of the Radio Act and Section 319 of the Communications Act, although neither section in terms required such a hearing. Even though Section 16 of the Radio Act was amended in certain other particulars when it was carried over to Section 319 of the Communications Act, it was not amended in that particular.

[9] In the first Morgan case, page 480, this Court said: "* * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to

298 U. S. 468, 480-481; *Morgan* v. *U. S.* 304 U. S. 1, 19-20.)

The decision of the lower court that "the Communications Act (Section 310(b)) as now phrased, contemplates an application, hearing, if necessary, and decision upon the basis of public interest, just as much in the case of an application for the transfer of an oustanding license as in the case of an application for a proposed new station license" (R. 30) is manifestly correct. As thus construed, the requirements of the Act and the relationship of Sections 308, 309(a) and 310(b) conform to the test laid down by the decisions of this Court.[10]

II.

The Legislative History of Section 402 of the Act Supports the Construction Placed Upon it by the Lower Court.

Conceding *arguendo* that the failure of Congress to refer in terms to applicants for assignment of license in Section 402(b) raises doubt as to where judicial review of adverse decisions and orders of the Commission affecting such applications may be had, we submit that recourse to the purpose and legislative history of the Act resolves any such doubt in favor of the decision of the lower court.

---

afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument * * *".

[10] In the case of *Yamataya* v. *Fisher*, 189 U. S., 86, 101, this Court in discussing the principles of statutory construction involved here, said: "* * * In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant * * *".

A. Jurisdiction of the Court of Appeals for the District of Columbia in Transfer Cases is Consistent with the General Scheme of the Act and Its Legislative History.

The Communications Act of 1934 was the result of a long felt need for the consolidation and centralization of "authority heretofore granted by law to several agencies" in the field of communications as well as a desire upon the part of Congress to grant "additional authority with respect to interstate and foreign commerce in wire and radio communication." (Section 301). From the first consideration which was given to the bill designed to accomplish these purposes (S. 3285, 73rd Congress, 2nd Session), two fundamental questions arose. The first of these concerned what, if any, changes should be made in provisions of existing law with respect to the subject of communications, and the second concerned problems of organization and administration which would result from conferring upon a single agency the many and diverse functions heretofore performed by several agencies in this field. Broadly speaking, the latter question resolved itself into one of merging the entirely heterogenous functions incident to the regulation of broadcasting with those necessary for the regulation of common carriers of communications.

In general, satisfaction was expressed with existing law on the subject of broadcasting with the result that most provisions of the Radio Act of 1927 were reenacted into law as Title III of the Communications Act. Likewise, substantial provisions of the Act establishing the Interstate Commerce Commission were reenacted with minor amendments in Title II of the Communications Act. Apparently there was no doubt in the mind of either house of Congress or in either committee which considered this measure that the provisions of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), relating to enforcing or setting aside orders of the Interstate Commerce Commission should be extended and made applicable to orders of the new com-

mission rendered in common carrier matters. But from the outset, differences existed both in the Senate Committee on Interstate Commerce and as between the houses concerning the proper tribunal to hear and determine cases involving the judicial review of decisions and orders of the Commission rendered in broadcast matters.[11]

The House Committee on Interstate and Foreign Commerce was in favor of reenacting all provisions of the Radio Act of 1927, as amended, without substantial change, including the appellate section, thus leaving all jurisdiction in the matter of appeals from decisions and orders of the new commission rendered in broadcast matters with the Court of Appeals for the District of Columbia. The Senate Committee on Interstate Commerce after much deliberation proposed a compromise plan which first appeared as Section 402 of S. 3285. It is the statements made in the Committee reports and on the floor of the Senate in explanation of the reasons which motivated the suggestion and final adoption of this compromise plan which are important here because this was the plan which was finally enacted into law as Section 402 of the Communications Act. (*Wright* v. *Vinton Branch*, 300 U. S. 440, 463.)[12]

---

[11] Differences in the views of the Senate Committee on Interstate Commerce and the manner in which they were resolved were explained by the Committee Chairman, Senator Dill, when he presented the report of his Committee (78 Congressional Record, pp. 8825-8826) and again in the report of the Committee itself (Senate Report No. 781, 73rd Congress, 2nd Session, pp. 9-10); differences between the Senate and House Committees and their solution were explained in the House Report (House Report No. 1850, 73rd Cong. 2nd Sess., pp. 2-3) and in the Conference Report (House Report No. 1918, 73rd Cong. 2nd Sess., pp. 49-50).

[12] Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to reports of Congressional committees which have considered the measure, (*McLean* v. *United States*, 226 U. S. 374, 380; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 435); to exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation, (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 475; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 536); to comparison of

When Senator Dill, Chairman of the Senate Committee on Interstate Commerce, submitted S. 3285 to the Senate he made an explanation of Section 402 of that Bill to the Senate (78 Congressional Record, pp. 8825-8826) in which he stated:

> "I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which has been granted against them or affecting them when they did not bring the case into court. * * * So we provide that where the decisions of the Commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or the permit, *or whatever it may be,* comes to the commission and asks for a change in his license or asks for a new license, *or asks for something to be done by the commission,* then if the commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." (Italics supplied.)

The report of the Senate Committee (Senate Report No. 781 73rd Cong. 2nd Sess.), submitted at the same time, contains this language (pp. 9-10):

> "Where a licensee desires to appeal from orders of the Commission affecting his interest, but which he did not originate, he may file his appeal in the three judge district court in the jurisdiction where he lives.

---

successive drafts or amendments of the measure, (*United States* v. *Pfitsch*, 256 U. S. 547, 551; *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 155); and to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology, (*Federal Trade Comm'n* v. *Raladam Co*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625).

> In those cases where he has applied to the Commission for an order and desires to appeal from the Commission's action, he must come to Washington, D. C., to prosecute his appeal, just as he came to Washington to ask for the order."

S. 3285, containing Section 402, as explained in the Senate Report and by Senator Dill in his statement on the floor, passed the Senate on May 15, 1934 (78 Congressional Record, p. 8854). The Bill was referred to the House Committee on Interstate and Foreign Commerce and was reported with an amendment, the effect of which was to reenact the Radio Act of 1927, as amended without the changes proposed in Title III of S. 3285 (House Report No. 1850, 73rd Cong. 2nd Sess. p. 7). After being further amended in particulars not here important, the Bill was passed by the House as reported by its Committee, and the House insisted on its amendments and requested a conference with the Senate (78 Congressional Record, p. 10332.) The Senate disagreed to the House amendments and agreed to a conference (78 Congressional Record, p. 10365). The Conference Report which was later submitted adopted Section 402 of the Senate Bill with this explanation (House Report No. 1918, 73rd Cong. 2nd. Sess., pp. 49-50):

> "The Senate bill (sec. 402), for the purposes of cases involving carriers, carries forward the existing method of review of orders of the Interstate Commerce Commission, and, in the main, for 'radio' cases carries forward the existing method of review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission. The House provision contains a similar provision as to cases involving carriers, but leaves the present section 16 of the Radio Act of 1927, as amended, applicable in all radio cases. The substitute adopts the Senate provision."

Thus the joint and final legislative report on Section 402 of the Communications Act not only repeats the substance of statements made by Senator Dill and by the Senate Report to the effect that the touchstone of jurisdiction in "radio" cases should be whether the proceeding had been initiated by the Commission upon its own motion or by a party applicant, but expressly enumerates those cases which can arise on the Commission's own motion and which are to be reviewed by a statutory three-judge court as distinguished from the Court of Appeals for the District of Columbia.

Both houses of Congress agreed to the Conference Report and the Bill as finally enacted and approved contained Section 402 as thus explained. While meticulous search may show minor and unimportant differences in expression in the Committee reports concerning some of the technical aspects of the plan established by Section 402 no doubt can exist concerning the general scheme adopted. This scheme contained three major parts: (1) Extension of the provisions of the Urgent Deficiencies Act to all orders of the new commission rendered in common carrier matters; (2) reenactment generally of the appellate provisions of the Radio Act of 1927, as amended, in the new Act to govern appeals in radio cases; and (3) the exemption from the appellate provisions of the Radio Act thus reenacted of certain cases and the establishment of jurisdiction to hear such cases in a statutory three-judge court as provided in the Urgent Deficiencies Act.

Nor can doubt exist concerning the reasons which motivated the suggestion and final adoption of this legislative scheme. The reason for the first and second parts of the scheme was satisfaction of the lawmakers with provisions of existing law. The reason for the third part of the scheme was dissatisfaction with the provisions of existing law which required all persons to prosecute appeals from adverse decisions and orders rendered in broadcast matters

in the Court of Appeals for the District of Columbia irrespective of whether the proceeding had been initiated by the Commission or by the party who felt himself aggrieved by the order. To correct this situation, it was the clear intent of the lawmakers to so alter the appellate provisions of existing law as to permit broadcast licensees who were proceeded against by the Commission to secure the advantage, if any, accruing to them by virtue of a trial of their case in a statutory three-judge court in the district of their residence.[13] Conversely, it was the intent of the lawmakers to continue in effect the requirement that any person who voluntarily applied to the Commission for an instrument of authorization, which the Commission was empowered to grant under Title III of the Act, should come to the Court of Appeals for the District of Columbia if they desired a judicial review of any adverse decision and order.[14]

---

[13] Those provisions of the Act providing for the revocation or modification of an existing radio station license are found in Section 312 (48 Stat. 1086; 47 U. S. C. Section 312). Provisions specifically providing for the suspension of a radio station license were contained in Section 312 of S. 3285 but were dropped from the Bill before its enactment (Senate Report No. 781, 73rd Congress, 2nd Session, p. 7). Proceedings to modify a license, like proceedings to revoke a license under Section 312 of the Act, are instituted by the Commission on its own motion and must be distinguished from proceedings initiated by a party under Section 309(a) where application is made by the party to have an existing license modified.

Section 402(b) (3) of the Act, which gives a right of appeal to the Court of Appeals for the District of Columbia to "any radio operator whose license has been suspended by the Commission", was not included in Section 402 of the Communications Act as originally enacted. It was added by Public Law No. 97, 75th Congress, approved May 20, 1937, C. 229, Sec. 12, 50 Stat. 197.

[14] Former Senator Dill (now practicing law before the Bar of this Court) has written a book entitled "Radio Law" in which he discusses the legislative scheme established by Section 402 of the Communications Act. There, after referring to the two types of judicial review provided for and the type of proceeding contemplated by Section 402(a), he describes Section 402(b) and the proceedings which were meant to be included by that subsection as follows (p. 218):

> "The other kind of an appeal, which is the kind that most attorneys engaged in practicing radio law relating to broad-

Since a transfer proceeding under Section 310(b) of the Act is clearly one initiated by the parties, as distinguished from the Commission, the decision of the lower court sustaining its jurisdiction is consistent with the general scheme of the Act as shown by its legislative history.

B. The rule of the Pote case has been rejected judicially and has not been ratified legislatively.

Great reliance is placed by Petitioner upon the fact that in the case of *Pote* v. *Federal Radio Commission*, 67 F. (2d) 509, decided by the Court of Appeals for the District of Columbia more than seven years ago, it was held that an applicant for transfer of a radio station license under Section 12 of the Radio Act of 1927 had no right to appeal to that court from a decision and order of the Radio Commission denying its application. Petitioner contends: (1) That the question presented in the *Pote* case is identical with the question presented here; (2) that the provisions of the transfer section of the Radio Act (Section 12) are essentially similar to Section 310(b) of the Communications Act; (3) that the provisions of the appellate section of the Radio Act (Section 16) are in material respects identical with Section 402(b) of the Communications Act; and (4) that since Congress enacted Section 402(b) of the Communications Act after the decision in the *Pote* case, it must be presumed to have adopted and ratified the construction placed upon Section 16 of the Radio Act by the

---

casting must use, is the appeal to the United States Court of Appeals for the District of Columbia. Section 402(b) applies to all appeals relating to licenses. It provides for appeals from all decisions of the Commission concerning applications for construction permits, the granting, renewing, modifying or refusing of a license. In other words, an applicant from any part of the United States who files an application for a construction permit for a new station or construction permit for more power or for a renewal, modification or *transfer of license*, if dissatisfied with the action of the Commission, must appeal to the United States Court of Appeals for the District of Columbia. *He can not go before a three-judge court.*" (Italics supplied).

District of Columbia court in that decision since it substantially reenacted its provisions without in terms referring to applications for transfer of license. There are several reasons why this conclusion is not sound and can not be determinative here.

In the first place, the *Pote* case was presented to the court upon a theory different from that employed in the present case. There the contention was made and rejected that an application for assignment of license was in substance and effect an application for modification of license. (*Pote* v. *Federal Radio Commission, supra* pp. 509-510.) Whether the majority of the court should have considered the matter as Justice Groner considered it in his dissenting opinion and sustained jurisdiction upon the theory that the applicant there was an "applicant for a radio station license" is another matter. That the majority did not so consider it is shown by its opinion.

In the second place, there are substantial differences between Section 12 of the Radio Act and Section 310(b) of the Communications Act, which differences were observed by the lower court in its opinion (R. 32).

Section 12 of the Radio Act did not in terms require the Commission's determination in transfer cases to be governed by the same statutory standard which governed the Commission's decisions upon other applications, and was therefore susceptible of an interpretation that it was merely a prohibitory measure designed to prevent an avoidance of the licensing provisions of that Act rather than one of its licensing provisions which furnished another method of securing qualified holders of the instruments of authorization which the Commission was empowered to grant. It was susceptible of an interpretation that it could

be administered administratively, and did not require the exercise by the Commission of its quasi-judicial functions.[15]

No such construction can properly be placed upon Section 310(b) of the present Act, both because of the terms of that section itself and because of its legislative history. Section 310(b) was enacted by Congress with the understanding that it constituted a substantial re-enactment of Section 12 of the Radio Act "modified as proposed by H. R. 7716" and further modified "to require the Commission to secure full information before reaching a decision on such transfers."[16] H. R. 7716 proposed three changes in Section 12 of the Radio Act which are material here: (1) It extended the prohibition against the authorized assignment of licenses so as to include also the unauthorized transfer of control of licensee corporations; (2) it prescribed the statutory standard of compliance with the "public interest" as a guide to and test for Commission action in passing upon such cases; and (3) it specifically provided that the Commission hold hearings in all cases arising under Section 12 of the Radio Act as thus

---

[15] The last paragraph of Section 12 of the Radio Act of 1927 (46 Stat. 844) provides as follows: "The station license required hereby, the frequencies and wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority."

[16] Senate Report No. 781, 73rd Congress, 2nd Session, stated (Page 7): "Section 310(b) is Section 12 of the Radio Act as modified by H. R. 7716, requiring the Commission to secure full information before giving its consent to the transfer of a license".

House Report No. 1918, 73rd Congress, 2nd Session, stated (p. 49): "Section 310(b) is substantially section 12 of the Radio Act modified as proposed by H. R. 7716. The section relates to transfer of radio licenses. As in H. R. 7716 the authority to approve or disapprove such transfers is extended to cover transfer of stock control in a licensee corporation. The present law is also modified to require the Commission to secure full information before reaching a decision on such transfers."

amended.[17] The failure of Congress to carry over into Section 310(b) the mandatory requirement that the Commission hold hearings in *all transfer and assignment cases* and the substitution of the requirement that the Commission secure *full information* before passing upon such cases, can not support the construction of Section 310(b) for which Petitioner contends.

The conclusion to be drawn both from Section 310(b) itself and from its legislative history is neither that Congress intended the Commission to pass upon and determine all transfer applications without hearing, as suggested by Petitioner, nor that this section was to be considered as a mere prohibitory measure designed to prevent the avoidance of other licensing provisions of the Act as the majority of the Court in the *Pote* case seemed to consider Section 12 of the former Act. It is rather that the Congress intended Section 310(b) to be a part of the licensing provisions of the Act designed to accomplish the same purpose as other licensing provisions, and that in administering this section, the Commission was required to grant hearings in all cases where a hearing was necessary for the proper and efficient administration of the Act or for the purpose of satisfying constitutional requirements of due process. The requirement that the Commission secure "full information" before passing upon such cases implies that the conventional and usual method of accomplishing this result, namely, the conduct of hearings, will be employed and the fixing of a statutory standard as a limitation upon and guide for the exercise of the Commission's discre-

[17] Section 8 of H. R. 7716, 72nd Congress, 2nd Session, provided in part as follows: "The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any company, corporation or association holding such license, to any person, firm, company, association, or corporation, unless the Commission shall, after a hearing, decide that said transfer is in the public interest, and shall give its consent in writing."

tion repels any other construction. (See pp. 14 to 16 *ante.*)

Finally, we submit that whether the majority opinion in the *Pote* case be correct or incorrect upon the basis of the transfer section then in effect, such decision can not now be binding or even persuasive upon this Court. The rule of the *Pote* case has been repudiated by the court which announced it (R. 32), and there are valid reasons why the doctrine of legislative ratification can not apply.

No case has been found where this Court has felt impelled to employ the doctrine of legislative ratification except: (1) where there has been a long continued and uniform construction of a particular statute by lower federal courts or administrative and executive officers, or both (*Sessions* v. *Romadka,* 145 U. S. 29, 41-42; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492-493; *U. S.* v. *Ryan,* 284 U. S. 167, 174-175; *Missouri* v. *Ross,* 229 U. S. 72, 75); or (2) where this Court has itself construed a particular act prior to its reenactment by Congress (*Latimer* v. *U. S.* 223 U. S. 501, 504; *Hecht* v. *Malley,* 265 U. S. 144, 153).

The reasoning of Justice Stephens' dissenting opinion, seized upon so avidly by Petitioner, can not be adopted. One decision of a lower federal court "construing an act does not approach the dignity of a well-settled interpretation." (*U. S.* v. *Raynor,* 302 U. S. 540, 551-552.) The further fact that the court which rendered that decision had exclusive jurisdiction of the subject matter and that this Court refused to grant certiorari can not give the decision of the District of Columbia court in the *Pote* case the "dignity" claimed for it. It is fundamental that the refusal of this Court to grant certiorari in a given case is not the equivalent of an affirmance of the decision of the lower court in that case. The adoption of Petitioner's theory that Congress has adopted the rule of the *Pote* case would amount to a dangerous and unwarranted extension of the doctrine of legislative ratification for which there is no precedent.

C. Properly considered and construed, all legislative records show that transfer cases, like all other radio licensing cases not initiated by the Commission, are reviewable only in the Court of Appeals for the District of Columbia.

Petitioner predicates much of its argument concerning legislative intent on language found in three paragraphs of the Senate Report on S. 3285 (Senate Report No. 781, 73rd Cong. 2nd Sess. p. 9). Attention is called to the fact that in one paragraph of that report, the statement is made that the Bill (Section 402(a)) excludes certain orders of the Commission from the jurisdiction of statutory three-judge courts, namely, that "orders relating to the granting or refusal of an application for a new radio station license or for the renewal or modification of a license shall be appealed only to the Court of Appeals of the District of Columbia." Special emphasis is placed upon the fact that in the following paragraph the report summarizes Section 402 of the Bill as transferring "the provisions of the present law with respect to injunctive relief and appeal as now found in the Interstate Commerce Act and the Radio Act to this act, with the exception of the three kinds of radio cases referred to above."

From this Petitioner contends that it was the intention of Congress to restrict the jurisdiction of the Court of Appeals for the District of Columbia to three types of cases, namely, orders granting or refusing applications for a new station license, for a renewal of license, or for a modification of license. But we submit that the construction for which Petitioner contends can not be placed upon the language in question and if it can, that it can not have the significance which Petitioner attaches to it in view of other and subsequent steps in the legislative process.

In the first place, under then existing law (Section 16(a) of the Radio Act of 1927, as amended by Act of July 1, 1930; 46 Stat. 844) the Court of Appeals for the District

of Columbia had jurisdiction to review by appeal to that court all cases brought there by: (1) "any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the Commission"; (2) "any licensee whose license is revoked, modified or suspended by the Commission"; and (3) "any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application or by any decision of the Commission revoking, modifying, or suspending an existing station license." Section 402(b) of the Communications Act constitutes a substantial reenactment of paragraphs one and three of Section 16(a) with the omission of paragraph two, and with such changes in paragraph three as are necessary to make those provisions conform to the omission of paragraph two. The language of the Senate Report must be construed in the light of realities and not as Petitioner construes it.

What Congress did was to transfer to the Court of Appeals for the District of Columbia "provisions of the present law with respect to * * * appeal as now found in * * * the Radio Act to this act" with the exception of those cases involving the revocation, modification, or suspension of an existing license. These cases were excepted from the operation of Section 402(b) because, and only because, Section 16(a)(2) of the Radio Act was not reenacted either in Section 402(b) of the Communications Act or in the exception clause of Section 402(a) of that Act. In this manner, the legislative scheme of making jurisdiction to review the Commission's decisions and orders rendered in broadcast matters dependent upon who instituted the proceedings leading up to such orders was carried out. No other departure from then existing law with respect to this subject was then proposed or later accomplished.

In the second place, even if the language of the Senate Report is given the construction for which Petitioner con-

tends, this construction can not be considered as determinative of the final legislative intent in view of (1) the statements made by Senator Dill in explaining the general statutory scheme proposed in Section 402 and the reasons which motivated its proposal, and (2) the language of the Conference Report clearly reiterating the substance of Senator Dill's statements concerning this statutory scheme and specifically enumerating those broadcast licensing cases which were meant to be excluded from the operation of Section 402(b) and therefore reviewable by statutory three-judge courts under the provisions of Section 402(a) (see pages 19-21, *ante*).

The language employed by Senator Dill in explaining the provisions of Section 402 of S. 3285 to the Senate is not consistent with the construction placed by Petitioner upon the language of the Senate Report in the particulars heretofore indicated. In making his explanation, he made it clear beyond doubt that where orders of the Commission are entered in cases where the stations took no part in instituting the proceedings, review of such orders could be had in three-judge district courts in the jurisdictions where the stations are located. "But in the case where the applicant for the license or permit *or whatever it may be,* comes to the Commission and asks for a change in his license or asks for a new license, *or asks for something to be done by the Commission,* then if the Commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." (Italics supplied.) It is difficult to imagine how more all-inclusive language could be employed than that employed by Senator Dill in thus indicating that not only certain enumerated cases but every case instituted by a party, as distinguished from the Commission must be reviewed, if at all, in the District of Columbia court.

Moreover, since the Conference report stated that Section 402 of S. 3285 "in the main, for 'radio' cases carries forward the existing method of review of orders of the

Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission," we submit that there can be no doubt as to what Congress intended to do. Here the cases which were excepted from the operation of Section 402(b) were expressly enumerated and assignment cases were not thus dealt with. It is impossible to construe either the general or specific language of the Conference Report as evidencing an intention upon the part of Congress to depart from the general statutory scheme in assignment cases. If Congress had intended to make an exception of such cases and exclude them from the operation of Section 402(b), it could and would undoubtedly have so stated at some stage of the legislative proceedings if not in the law itself. On the contrary, both adherence to the general statutory scheme and the phrase "in the main, for 'radio' cases" compels the conclusion that Congress intended assignment cases to be treated as all other cases instituted by the application of a party.

Petitioner also contends that the use of the word "new" before the words "radio station license" appearing at page 9 of Senate Report No. 781, and the use in Section 402(b) of the Act of the word "existing" in the phrase "for renewal of an existing radio station license or for modification of an existing radio station license" are further evidence of the intent of Congress to exclude assignment cases from the operation of Section 402(b). But we submit that this conclusion does not follow.

The term "application for a new radio station license" is not found in Section 402(b) of the Act as finally enacted and is not found in Section 402(b) of S. 3285. It is found only in Senate Report No. 781, and used in the manner heretofore dealt with (ante, pp. 28-40). To engraft the word "new" upon Section 402(b) now would not be construction

but legislation, in view of the circumstances and the oft-repeated statement of the law makers that jurisdiction for judicial review of the Commission's decisions and orders in broadcast matters should depend upon who initiated the proceedings which gave rise to such decisions and orders.

Moreover, the use of the word "existing" in Section 402(b) of the Act as descriptive of the type of renewal and modification applications which were meant to be comprehended by that subsection cannot affect the meaning of the phrase "application * * * for a radio station license" upon which jurisdiction in this case depends. It is a *non sequitur* to say, as Petitioner says, that the intention of Congress to limit jurisdiction of the District of Columbia court to orders made in granting or refusing applications for modification or renewal of "an existing radio station license" carries with it a clearly expressed intention or even any inference that Congress meant to limit the meaning of the term "application for a radio station license" so as to exclude "existing licenses" and include only "new licenses" when neither of the qualifying words necessary for this construction was employed.

To avoid the conclusion of jurisdiction in the lower court which we believe is inescapable, Petitioner resorts to a new kind of reasoning. It concedes that the general scheme of the act relating to judicial review of the Commission's decisions and orders at the instance of one who feels himself aggrieved thereby is as stated in the report of the Conference Committee (Brief for Petitioner, footnote pp. 34-36). But it says that the instant case cannot be made to fit into that general statutory scheme because in other instances, having no relation and no analogy whatever to the present case, the Congress has (by inadvertance or design) provided for exceptions to or departures from the general statutory scheme. A mere statement of this proposition constitutes its best answer since its adoption would permit the piecemeal demolition of any statute which is not letter perfect

and would, in the guise of upholding legislative intent, entirely destroy it.

CONCLUSION.

Both because of the language of the statute and its legislative history, the judgment of the lower court should be affirmed.

Respectfully submitted,

DUKE M. PATRICK,
Counsel for Respondent,
Columbia Broadcasting System of California, Inc.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

Nos. 39-40.—October Term, 1940.

Federal Communications Commission, Petitioner, 39 *vs.* Columbia Broadcasting System of California, Inc. Federal Communications Commission, Petitioner, 40 *vs.* The Associated Broadcasters, Inc.	On Writs of Certiorari to the Court of Appeals for the District of Columbia.

[November 25, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We brought these two cases here, 310 U. S. 617, because they raise questions of importance touching the distribution of judicial authority under the Communications Act of 1934. (Act of June 19, 1934, 48 Stat. 1064, as amended by the Act of June 5, 1936, 49 Stat. 1475, and by the Act of May 20, 1937, 50 Stat. 189; 47 U. S. C. § 151 *et seq.*)

Insofar as action of the Federal Communications Commission is subject to judicial review, the Act bifurcates access to the lower federal courts according to the nature of the subject matter before the Commission. Barring the exceptions immediately to be noted, § 402(a) assimilates "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act" to the scheme of the Act of October 22, 1913 (38 Stat. 219), pertaining to judicial review of orders of the Interstate Commerce Commission. Therefore as to the general class of orders dealt with by § 402(a) jurisdiction rests exclusively in the appropriate district court, specially constituted, with direct appeal to this Court. Excepted from this scheme of jurisdiction is "any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license."

These five types of orders, thus placed beyond the jurisdiction of the district courts, are then affirmatively dealt with by § 402(b). As to them, that provision gives an appeal "from decisions of the Commission to the Court of Appeals of the District of Columbia," with ultimate resort to this Court only upon writ of certiorari.

Our problem, then, is to apply this scheme of jurisdiction to the situation before us. Acting under § 310(b) of the Communications Act, the Commission refused consent to an assignment to the Columbia Broadcasting System of California of a radio station license held by the Associated Broadcasters. Columbia and Associated thereupon sought in the Court of Appeals for the District review of the Commission's denial of consent. The Commission moved to dismiss the appeals for want of jurisdiction. The court below, with one justice dissenting, denied the motions and entertained jurisdiction. 108 F. (2d) 737.

The crux of the controversy is whether an order of the Commission, in the exercise of its authority under § 310(b), denying consent to an assignment of a radio station license is an order "refusing an application . . . for a radio station license," within the meaning of §§ 402(a) and (b). If it is, the court below was seized of jurisdiction. If it is not, that court was without it. In the language quoted in the margin, Congress has made the choice and it is for us to ascertain it.[1]

---

[1] Sec. 402: "(a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

"(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."

If the assignee is covered § 402(b)(1) the assignor would be within § 402(b)(2).

Primarily, our task is to read what Congress has written. As a matter of common speech, the excepted types of orders which alone can come before the Court of Appeals for the District of Columbia do not include an order refusing the consent required by § 310(b). Refusing "an application . . . for a radio station license" is hardly an apt way to characterize refusal to assent to the transfer of such a license from an existing holder. Nor is there anything to indicate that the peculiar idiom of the industry or of administrative practice has modified the meaning that ordinary speech assigns to the language. Instead of assimilating the requirements for transfers to applications for new licenses or renewals, the Act as a whole sharply differentiates between them. Different considerations of policy may govern the granting or withholding of licenses from those which pertain to assent to transfers. And Congress saw fit to fashion different provisions for them. Compare §§ 307, 308, 309, and 319 with § 310(b). There are also differences in the formulated administrative practice for disposing of applications for station licenses and requests for consents to transfer. Nor do some similarities in treatment make irrelevant the differences.

A sensible reading of the jurisdictional provisions in the context of the substantive provisions to which they relate gives no warrant for denying significance to the classification made by Congress between those orders for which review can only come before the local district courts, and those five types of orders, explicitly characterized, which alone can come before the Court of Appeals for the District. And an order denying consent to an application for a transfer is not one of those five, for it is not an application for "a radio station license" in any fair intendment of that category.

What thus appears clear from a reading of the Communications Act itself is not modified by the collateral materials which have been pressed upon us. That both sides invoke the same extrinsic aids, one to fortify and the other to nullify the conclusion we have reached, in itself proves what dubious light they shed. What was said in Committee Reports and some remarks by the proponent of the measure in the Senate are sufficiently ambiguous, insofar as this narrow issue is concerned, to invite mutually destructive dialectic but not strong enough either to strengthen or weaken the force of what Congress has enacted. See Sen. Rep. No. 781, 73d Cong., 2d Sess., pp. 9-10; House Rep. No. 1918, 73d Cong., 2d Sess., pp. 49-

50; 78 Cong. Rec. 8825-26. This leaves for consideration only the bearing of an earlier decision by the Court of Appeals for the District on this very question, arising under the predecessor of the Communications Act, the Radio Act of 1927, 44 Stat. 1162, as amended, 46 Stat. 844. In that Act § 16 covered, for present purposes, the provisions of § 402(b) of the Communications Act. *Inter alia,* it provided for appeals to the court below by "any applicant for a station license." Construing that provision, the court below in *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, held that it was without jurisdiction over an appeal by a transferee to whom consent to a transfer had been denied. The present § 402 was adopted after this decision and another decision by the same court within this field of jurisdiction (*Goss* v. *Federal Radio Commission,* 67 F. (2d) 507) had been presumably brought to the attention of Congress. Hearings on S. 2910, 73d Cong., 2d Sess., pp. 44-45. On the one hand it is insisted that, in the light of these circumstances, the construction in the *Pote* decision was impliedly enacted by Congress, while respondents urge that differences in the provisions regarding the Commission's power over consent to transfers destroy the significance of the *Pote* case. But these changes in § 310(b), which stiffened the control of the Commission over transfers, are wholly unrelated to the technical question of jurisdiction with which we are now concerned. We are not, however, willing to rest decision on any doctrine concerning the implied enactment of a judicial construction upon reenactment of a statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to language. And so, at the lowest, the *Pote* case certainly does not detract from, but if anything reenforces, the construction required by a clear-eyed reading of the statute.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.